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IN THE

Supreme Court of the United States

October Term, 1956

No. ~~1098~~ 200

AIDA S. KOVACS,

Petitioner,

against

GEORGE A. BREWER, SR.,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

HARRIS B. STEINBERG
and
SYLVESTER & HAIMOFF,
Attorneys for Petitioner.

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The Petitioner, Aida S. Kovacs, prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina entered in the above entitled cause on March 20, 1957.

Opinions Below

The opinion of the Supreme Court of North Carolina, printed in Appendix A hereto, pages 19-27, is reported in 245 North Carolina 630.

Jurisdiction

The judgment of the Supreme Court of North Carolina was entered on March 20, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254.

Question Presented

Whether an order of the New York Supreme Court in a divorce action, modifying its former judgment in respect of custody, is binding upon the Courts of North Carolina, under Article IV, Section 1 of the United States Constitution, where the parties appeared in the New York proceeding, but the child resided in and was physically present in North Carolina at the time of modification.

Constitutional Provision and Statutes Involved

Article IV, Section 1, of the Constitution, provides:

> "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof."

Congress, by the Act of May 26, 1790, C. 11, as amended, R. S. Sec. 905, 28 U. S. C. Sec. 687, declared that judgments:

> "shall have such faith and credit given to them in every Court within the United States as they have by law or usage in the Courts of the State from which they are taken."

Statement

On April 18, 1945, the Petitioner was married to George A. Brewer, Jr., in the City of New York, where they then resided. They had one child, Jane Elizabeth Brewer, born on May 30, 1946, in New York.

On January 17, 1951, a judgment of divorce was rendered by the New York Supreme Court against the Petitioner on the ground of her adultery; and custody of the

child was awarded to the child's paternal grandparent, George A. Brewer, Sr., a resident of North Carolina, because the child's father, plaintiff in the divorce action, was then and still is in the United States Navy. In awarding custody of the child to the paternal grandfather, Mr. Justice Walter of the New York Supreme Court stated:

> "The question of the custody of the child remains. Even though I find defendant guilty of adultery, I would not, on that finding alone, take a four-year old girl from her mother if the mother's situation and surroundings were such as to promote the interest and well-being of the child. I think the best interests of the child require that she be placed in the custody of plaintiff's father (her paternal grandfather) and the plaintiff asks that be done at least until he is discharged from the Navy."

Thereafter, the Petitioner on October 2, 1951, and again on November 17, 1952, applied in the New York Supreme Court for an order modifying the decree to award her custody, relying upon intervening changes in her situation and surroundings, in both of which proceedings the Brewers appeared and submitted opposing affidavits. Both applications, however, were denied.

In July, 1954, the Petitioner married Joseph Kovacs, who was the co-respondent in the original divorce action and took up her residence with him in Riverdale, New York.

Relying upon her remarriage and the resulting material improvement in her circumstances, the Petitioner again applied in the New York Supreme Court on November 9, 1954, for a modification of the divorce decree to award her custody of the child. The Brewers again appeared in opposition, were represented by counsel and submitted answering affidavits and briefs.

This application was granted by Mr. Justice Brisach of the New York Supreme Court, who stated:

> "Previous applications to modify this decision have been denied, presumably on the ground that there has been no material change in defendant's situation and surroundings. Defendant, however, is now remarried and is now living in an apartment in a desirable residential community in Riverdale, New York. Her situation is presently such as to permit the bringing up of the child, who is now eight years of age, in proper surroundings. The papers disclose that the plaintiff has re-enlisted and is now serving in the Navy and intends to continue such service and the infant is now living with her paternal grandfather, who is admittedly a diabetic and suffers from coronary thrombosis. The accommodations and surroundings of the mother are acceptable for the welfare of the infant and would be more desirable for an eight year old girl, whose bringing up belongs to her mother."

The order of modification awarding custody of the child to the Petitioner was duly served upon the Brewers in North Carolina pursuant to the order of the New York Court, but the Brewers refused to surrender the child.

Thereupon, and on or about February 20, 1956, the Petitioner brought a proceeding in the Superior Court of North Carolina, under the provisions of Section 50-13 of the North Carolina General Statutes, which governs jurisdiction of controversies respecting the custody of children of parents divorced by courts of States other than North Carolina.

The petition in the North Carolina proceeding set forth the facts with respect to the marriage of the parties in New York; the birth of the child; the divorce proceeding and the award of custody to the paternal grandfather; the original applications which were denied; and then alleged the following with respect to the New York order of modification:

> "That after her remarriage, this petitioner once more, on November 9, 1954, applied to the afore-

said New York Court for a modification of the divorce decree to award custody of the child to her. That on December 23rd, 1954 this application was granted by order awarding custody of the child, Jane Elizabeth Brewer, to this petitioner. That the defendant herein, George A. Brewer, Sr., and his son, George A. Brewer, Jr., former spouse of this petitioner, and father of the child, appeared in the proceeding by counsel; submitted to jurisdiction of the said New York Court on the question of custody therein raised, and submitted affidavits in opposition to the granting of the order. A copy of said order is attached hereto and made a part hereof, marked Exhibit B."

The petition then declared that the Brewers wrongfully refused to relinquish custody and control of the child, and that the decree of the New York Court was entitled to full faith and credit in North Carolina, stating:

"That this petitioner is informed and believes and therefore alleges that the decree of the New York Court dated December 23, 1954, is entitled to full faith and credit in the courts of North Carolina except as to matters showing changed circumstances since the date of such decree. And petitioner expressly pleads said New York decree as entitling her to custody of said child by judgment of this Court, in the absence of a showing by defendant of such changed circumstances."

The Defendant, the paternal grandfather, by his answer, alleged that the child was not physically present in New York in December, 1954, when the New York order awarding custody to the Petitioner was made; that at the time of said order, the child's father resided in and was domiciled in the State of North Carolina; that the best interests of the child would be served by allowing her to remain in the custody of the grandparent; and that the Petitioner was not a fit person to have custody of the child.

No reference was made in the answer to any change of circumstances occurring since December 23, 1954, the date of the entry of the order of modification.

The case was heard on September 12, 1956, at Winton, North Carolina before Judge Henry L. Stevens, Jr. By direction of the Court, the matter was heard solely on affidavits, the pleadings, certain stipulations and the exhibits annexed to the petition.

At the hearing before Judge Stevens, the Petitioner relied solely upon the New York order. The Defendant in the North Carolina Court offered in evidence a series of affidavits designed to show that the Petitioner was not a suitable person to have custody of the child.

Thereafter, and on December 10, 1956, Judge Stevens rendered judgment denying the Petitioner's application for custody and deciding expressly that the North Carolina Court was "not bound by or required to give effect" to the New York decree. As to this, the Court stated:

> "That this Court, in passing upon the care, custody and control of Jane Elizabth Brewer, is not bound by or required to give effect to the decree of the Court of the State of New York made in 1954 and hereinbefore referred to."

The only finding of the Court relating to a circumstance occurring subsequent to the entry of the New York judgment related to the fact that in 1954, when the New York decree was entered, the son of Mrs. Brewer was living with the parties, whereas at the time of the North Carolina proceeding, he was no longer living with them. The Court stated:

> "That the removal of the son of Mrs. George A. Brewer, Sr. provides more space in the home for the convenience and comfort of said child, and lessens the responsibility of the said Mr. and Mrs. George A. Brewer, Sr. in providing maintenance and supervision for said minor."

An appeal to the Supreme Court of North Carolina was thereafter duly taken and was heard on or about March 5, 1957.

The North Carolina Supreme Court, affirming the decision of the Superior Court, held that it was not bound to give any effect to the New York decree. The Court stated:

> "We further hold that the modification of the 1951 decree made by the New York Court in 1954, has no extra-territorial effect, and we are not bound by the full faith and credit clause of the Constitution of the United States, Article IV, section 1, to recognize and enforce the modified decree. In re Alderman, supra; In re Biggers, supra; Hoskins v. Currin, supra.
>
> "An action which relates to the custody of a child is in the nature of an *in rem* proceeding. Therefore, the child is the *res* over which the court must have jurisdiction before it may enter a valid and enforceable order. Weddington v. Weddington, 243 N. C. 702, 92 S. E. 2d 71; Richter v. Harmon, supra; Hoskins v. Currin, supra; Coble v. Coble, 229 N. C. 81, 47 S. E. 2d 798."

POINT I

The North Carolina decision is in conflict with decisions of the United States Supreme Court.

The jurisdiction of the Court of any State to render a valid divorce decree affecting marital status, alimony and custody of children has never been questioned where husband and wife appeared or were served in the state (*May* v. *Anderson*, 345 U. S. 528). Jurisdiction *in personam* is essential where the decree purports to affect alimony or custody (*Estin* v. *Estin*, 334 U. S. 541; *May* v. *Anderson, supra*). But where there is personal jurisdiction of both parties, the power of the Court to dispose of all of the issues incident to the divorce proceedings,

including alimony and custody, has never been challenged (*Estin* v. *Estin, supra; May* v. *Anderson, supra*).

In respect of custody, the Supreme Court has equated "the jurisdictional requirements for a custody decree to those for an *in personam* judgment" (Mr. Justice Jackson, dissenting, in *May* v. *Anderson, supra*). The decisions which have had the effect of equating these jurisdictional requirements, all of which were ignored by the North Carolina Supreme Court, may be briefly reviewed.

In *Estin* v. *Estin*, 334 U. S. 541, an alimony decree rendered in favor of the wife in a New York separation suit was followed by a Nevada divorce obtained by the husband, without personal service of the wife, which purported to nullify the New York alimony order. Holding that this could not be accomplished without personal jurisdiction of the wife, the Court said, at page 548, 549:

> "The Nevada decree that is said to wipe out respondent's claim for alimony under the New York judgment is nothing less than an attempt by Nevada to restrain respondent from asserting her claim under that judgment. That is an attempt to exercise an *in personam* jurisdiction over a person not before the court. That may not be done. Since Nevada had no power to adjudicate respondent's rights in the New York judgment, New York need not give full faith and credit to that phase of Nevada's judgment. A judgment of a court having no jurisdiction to render it is not entitled to the full faith and credit which the Constitution and statute of the United States demand. *Hansberry* v. *Lee*, 311 U. S. 32, 40-41; *Williams* v. *North Carolina*, 325 U. S. 226, 229, and cases cited."

Similarly, in *Armstrong* v. *Armstrong*, 76 Sup. Ct. 629, 100 L. Ed. 460, the Court held that a Florida divorce, obtained on constructive service, which made no alimony award, could not preclude the wife, an Ohio resident, from obtaining an alimony award in Ohio, as an incident to her

divorce action in that State, though no divorce decree could be rendered in Ohio in view of the valid Florida divorce. In its opinion, the Court said, 100 L. Ed., at page 466:

> "It has been the constitutional rule in this country at least since Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565, decided in 1878, that non-residents cannot be subjected to personal judgments without such service or appearance. We held in Estin v. Estin, 334 U. S. 541, 92 L. ed. 1561, 68 S. Ct. 1213, 1 A. L. R. 2d 1412, that an alimony judgment was this kind of 'personal judgment.' "

In *May* v. *Anderson*, 345 U. S. 528, cited by the United States Supreme Court in the *Armstrong* case, *supra,* the Court "equated" the jurisdictional requirements of alimony cases to custody cases. There, the parties were married and lived in Wisconsin until they separated by consent in December, 1946, the wife taking the children to Ohio to consider "her future course". When she decided not to return to Wisconsin, the husband brought an action for divorce in Wisconsin seeking custody of the children, in which she was not personally served. The Wisconsin Court entered a divorce decree, awarding custody of the children to the husband. Armed with this decree, the husband obtained the children, bringing them back to Wisconsin.

Some years later, he brought them to Ohio for a visit with the mother, whereupon she refused to surrender them. The husband then brought a *habeas corpus* proceeding in Ohio. The Ohio Court directed the wife to surrender the children to the husband, holding the Wisconsin judgment binding under the full faith and credit clause.

The Supreme Court reversed, ruling that the original Wisconsin decree was not binding upon the wife because she had not been served with process in Wisconsin. The fact that the children were domiciled in Wisconsin and that the parties had stipulated that the domicile of both parents continued to be in Wisconsin, was held not sufficient

to require enforcement of the Wisconsin decree in the absence of personal service upon the wife. In its opinion, the Court said, per Mr. Justice Burton, at page 534:

> "In the instant case, we recognize that a mother's right to custody of her children is a personal right entitled to at least as much protection as her right to alimony.
>
> "In the instant case, the Ohio courts gave weight to appellee's contention that the Wisconsin award of custody binds appellant because, at the time it was issued, her children had a technical domicile in Wisconsin, although they were neither resident nor present there. We find it unnecessary to determine the children's legal domicile, because, even if it be with their father, that does not give Wisconsin, certainly as against Ohio, the personal jurisdiction that it must have in order to deprive their mother of her personal right to their immediate possession."

The Court accordingly held that Wisconsin was without jurisdiction to make a custody award, not because the children were in Ohio, but because the wife was.

Thus, the jurisdictional requirement of personal service upon, or an appearance by, the non-resident spouse, established in the alimony cases (*Estin* v. *Estin*, 334 U. S. 541) has expressly been made applicable to custody cases (*May* v. *Anderson, supra*); and as recently as April 1956, the Supreme Court cited *May* v. *Anderson*, a custody case, in dealing with an alimony award (*Armstrong* v. *Armstrong, supra*). Thus, as was pointed out by Mr. Justice Jackson in his dissenting opinion in *May* v. *Anderson*, the Supreme Court has "equated" the jurisdictional requirements of alimony and custody cases, stating (345 U. S. at page 540):

> "In spite of the fact that judges and law writers long have recognized the similarity between the jurisdictional requirements for divorce and for custody, this decision appears to equate the jurisdictional requirements for a custody decree to those for an *in personam* money judgment."

This is not to suggest that the presence of the child in North Carolina is without jurisdictional significance. A North Carolina court, acting in its capacity as *parens patriae*, may intervene in the interests of the child upon the basis of changed circumstances since the New York decree. This is a parallel and independent basis of jurisdiction, apart from the custody jurisdiction incidental to a divorce proceeding (*Finlay* v. *Finlay*, 240 N. Y. 249). The physical presence of the child within the state serves as the origin of this type of jurisdiction, which is founded upon the power of a state to regulate the custody of infants found within its territory. It has no relation to custody awards in divorce proceedings. In *Finlay* v. *Finlay, supra*, the Court said, per Cardozo, J., at pages 431, 432:

> "The jurisdiction of a State to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless (*Woodworth* v. *Spring*, 4 Allen, 321, 323; *White* v. *White*, 77 N. H. 26; *Hanrahan* v. *Sears*, 72 N. H. 71, 72; *Matter of Hubbard*, 82 N. Y. 90, 93). For this, the residence of the child suffices though the domicile be elsewhere (*Matter of Hubbard, supra*). But the limits of the jurisdiction are suggested by its origin. The residence of the child may not be used as a pretense for the adjudication of the status of parents whose domicile is elsewhere, nor for the definition of parental rights dependent upon status (cf. *Kline* v. *Kline*, 57 Ia. 386; *Griffin* v. *Griffin*, 93 Oreg. 78; *Lanning* v. *Gregory*, 100 Tex. 310; *Blackinton* v. *Blackinton*, 141 Mass. 432, 436; *Matter of Standish*, 197 App. Div. 176). Parents so situated must settle their controversies at home. Our courts will hold aloof when intervention is unnecessary for the welfare of the child.
>
> "We think the welfare of children does not appear from the complaint to be the basis of the husband's prayer for an apportionment of parental rights, nor is an action between contending spouses the proper form of remedy.

> "One situation there is, indeed, in which such an inquiry will be pursued in connection with an action between the spouses, or as a supplement thereto. The statute permits a judgment fixing the custody of children as an incident to a judgment for divorce or separation."

Residence of the child suffices as a ground of jurisdiction where intervention is necessary for the child's protection. It is not material where the parental rights of custody are to be adjudicated as incident to a divorce action.

The jurisdiction which may be exercised by the Court in the face of a prior foreign-custody award was described in *Halvey* v. *Halvey*, 330 U. S. 610. There, the parties having been married in New York, the wife took their child to Florida, established her residence there and obtained a decree of divorce which awarded her custody of the child. The day before the Florida decree was entered, the husband took the child back to New York without the wife's knowledge. Thereupon, the wife instituted habeas corpus proceedings in New York, seeking to enforce the Florida decree awarding her custody. The United States Supreme Court held that the New York Court had the same power to modify the custody decree as the Florida court would have had on the basis of proof not previously considered. In defining the proper scope of the jurisdiction exercisable by the New York Court under the full faith and credit clause, the Court said, per Mr. Justice Douglas, at page 613:

> "Facts which have arisen since the original decree are one basis for modification of the custody decree. *Frazier* v. *Frazier*, 109 Fla., p. 168, 147 So., p. 465; *Jones* v. *Jones*, 156 Fla. 524, 527, 23 So. 2d 623, 625. But the power is not so restricted. It was held in *Meadows* v. *Meadows*, 78 Fla. 576, 83 So. 392-393, that 'the proper custody of the minor child is a proper subject for consideration by the chancellor at any time, even if facts in issue could have been considered at a previous hearing, *if such facts were not* presented or considered at a former hearing'."

This, the Court held, constituted compliance with the full faith and credit clause, stating (p. 614):

> "So far as the Full Faith and Credit Clause is concerned, what Florida could do in modifying the decree, New York may do. * * * But a judgment has no constitutional claim to a more conclusive or final effect in the State of the forum than it has in the State where rendered."

This does not mean that the issues tried in New York may be relitigated in North Carolina. The policy of the full faith and credit clause is the restriction of repetitive litigation. In *Halvey* v. *Halvey, supra*, Mr. Justice Frankfurter stated (p. 616):

> "The constitutional policy formulated by the Full Faith and Credit Clause cannot be fitted into tight little categories or too abstract generalities. That policy was the nation-wide restriction of litigiousness, to the extent that States, autonomous for certain purposes, should not be exploited to permit repetitive litigation. In substance, the Framers deemed it against the national welfare for a controversy that was truly litigated in one State to be relitigated in another. Such limitation does not foreclose inquiry into what was litigated and what was adjudicated. The scope of the Full Faith and Credit Clause is bounded by its underlying policy and not by procedural considerations unrelated to it."

In applying this constitutional prohibition against duplicate litigation in custody matters, Mr. Justice Frankfurter stated (617):

> "The child's welfare must be the controlling consideration whenever a court which can actually lay hold of a child is appealed to on behalf of the child. Short of that, a valid custodial decree by Florida could not be set aside simply because a New York court, on independent consideration, has its own view of what custody would be appropriate."

It is respectfully submitted that the decision of the North Carolina Court has, in effect, set aside the New York order merely because the North Carolina Court "on independent consideration (had) its own view of what custody would be appropriate." No reference was made in the decision of the North Carolina Supreme Court to any intervening change of circumstances warranting a reversal of the New York decree awarding custody to the wife. The fact that a stepson of Brewer, Sr., had moved out was not referred to by the Supreme Court.

On the contrary, both the Superior Court and the Supreme Court (*supra*, pp. 6, 7) stated that they were not required to give any effect to the New York judgment. This is a palpable violation of the Full Faith and Credit Clause.

The question as to the effect upon jurisdiction of the absence of the child from the forum state was expressly reserved in *Halvey* v. *Halvey, supra*, where the husband had "abducted" the child to New York the day before the Florida decree was entered.

The Supreme Court stated at pages 615, 616:

> "The narrow ground on which we rest the decision makes it unnecessary for us to consider several other questions argued, *e.g.*, whether Florida at the time of the original decree had jurisdiction over the child, the father having removed him from the State after the proceedings started but before the decree was entered; * * * whether the State which has jurisdiction over the child may, regardless of a custody decree rendered by another State, make such orders concerning custody as the welfare of the child from time to time requires. On all these problems we reserve decision."

It is respectfully submitted that there is no justification, in principle, for a requirement of the physical presence or domicile of the child where the Court has jurisdiction of the parents in a divorce proceeding. Jurisdiction

basically is a matter of due process, involving essentially notice and hearing (*Pennoyer* v. *Neff*, 95 U. S. 714; *Williams* v. *North Carolina*, 317 U. S. 287).

The child clearly has no right or need for notice or hearing, where his guardians are before the Court.

It is accordingly respectfully submitted that the decision of the North Carolina Supreme Court violates the Full Faith and Credit Clause of the United States Constitution.

POINT II

The question of the jurisdiction of the New York court is *res adjudicata*.

Moreover, the question of the jurisdiction of the New York Court was not open to defendant in the North Carolina proceeding. The Brewers participated in the New York proceeding and had full opportunity to contest that Court's jurisdiction. Having failed to do so they are precluded by the New York determination (*Sherrer* v. *Sherrer*, 334 U. S. 343, 351; *Johnson* v. *Muelberger*, 340 U. S. 581; *Cook* v. *Cook*, 342 U. S. 126; *Davis* v. *Davis*, 305 U. S. 32). Defendant's neglect in New York is not the basis for attacking the New York decree in North Carolina. In *Sherrer* v. *Sherrer*, *supra*, the Court said at page 352:

> "If respondent failed to take advantage of the opportunities afforded him, the responsibility is his own. We do not believe that the dereliction of a defendant under such circumstances should be permitted to provide a basis for subsequent attack in the courts of a sister State on a decree valid in the State in which it was rendered."

The Court pointed out that the doctrine of *res judicata* applies to adjudications relating either to jurisdiction of

the person or of the subject matter where the parties were given full opportunity to litigate. The Court said at page 350:

> "Insofar as cases originating in the federal courts are concerned, the rule has evolved that the doctrine of *res judicata* applies to adjudications relating either to jurisdiction of the person or of the subject matter where such adjudications have been made in proceedings in which those questions were in issue and in which the parties were given full opportunity to litigate."

Applying this general principle to cases arising under the full faith and credit clause, the Court said at pages 351, 352:

> "We believe that the decision of this Court in the *Davis* case and those in related situations are clearly indicative of the result to be reached here. Those cases stand for the proposition that the requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister State where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree."

In *Johnson* v. *Muelberger*, 340 U. S. 581, the Court quoted the following principle from *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 78 (340 U. S. p. 585):

> " 'One trial of an issue is enough. "The principle of *res judicata* apply to questions of jurisdiction as well as to other issues," as well to jurisdiction of the subject matter as of the parties.' "

POINT III

The validity of the New York judgment, under New York law, has not been challenged.

There is no doubt that the modification of the custody award is valid in New York, despite the absence of the child at the time of the modification (*May* v. *May*, 233 N. Y. App. Div. 519 (1st Dept.); *People* v. *Winton*, 34 Misc. 21 aff'd 61 App. Div. 615; *Grenier* v. *Grenier*, 175 Misc. 406; and see *Langerman* v. *Langerman*, 303 N. Y. 465; *Ansorge* v. *Armour*, 267 N. Y. 492, 498).

In *May* v. *May*, *supra*, the Court said, at page 520:

> "It is true that where both parties are before the court, custody of a child or children without the jurisdiction may be made."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HARRIS B. STEINBERG
and
SYLVESTER & HAIMOFF,
Attorneys for Petitioner.

Dated, June 13, 1957

Appendix A

(Opinion of Supreme Court of North Carolina)

IN THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM—1957

No. 168—Northampton

—o—

AIDA S. KOVACS

—v.—

GEORGE A. BREWER, SR.

—o—

Appeal by petitioner from Stevens, J., at Chambers in Winton, North Carolina, 12 September 1956. From Northampton.

This is a proceeding brought pursuant to GS 50-13 to determine a dispute concerning the custody of the minor child of the parents who were divorced by a decree of the State of New York.

The order entered pursuant to the hearing in Winton, North Carolina, on 12 September 1956, was signed by consent of counsel at Halifax on 10 December 1956.

This matter was heard before his Honor Henry L. Stevens, Jr., Judge regularly assigned and holding courts of the Sixth Judicial District, at which time and place the petitioner was present and represented by counsel, and the respondent was present and represented by counsel. The minor child, who is the subject of this controversy, was also present, as was her father, George A. Brewer, Jr.

By direction of the court the matter was heard solely on affidavits, pleadings, certain stipulations and petitioner's exhibits, and upon consideration thereof the court found the facts as follows:

"1. That George A. Brewer, Jr., father of Jane Elizabeth Brewer, the minor child who is the subject of this controversy, enlisted in the U. S. Navy in 1946 and has been a member of such service since that date.

"2. That on April 18, 1945, the said George A. Brewer, Jr. married Aida Speciale (now Aida Kovacs). On May 30, 1946, a child, Jane Elizabeth Brewer, was born to said marriage. That they lived together in the marital relation until some time in 1950. That on July 31, 1950, George A. Brewer, Jr. instituted an action for divorce against his wife on the grounds of adultery in the Supreme Court of the State of New York in and for the County of New York. That on January 17, 1951, said Court entered a decree of divorce in favor of George A. Brewer, Jr. against his said wife on the grounds of adultery with Joseph Kovacs, and awarded the custody of the child, Jane Elizabeth Brewer, to George A. Brewer, Sr., the father of George A. Brewer, Jr., and the grandfather of said child.

"3. That immediately after rendition of the decree awarding custody of said child, the said Aida Brewer went into hiding, taking the child with her, and it was not until on or about September 6, 1951 that said father or grandfather were able to find the child and her mother. They were found living with Joseph Kovacs at 21 James Avenue in Jersey City and in order to gain the physical custody of the said child, it was necessary for the parent and grandparent to obtain a writ of habeas corpus in the

Superior Court Chancery Division of Jersey City. Upon a hearing on the return of said writ, physical possession and custody of said minor was granted to the father and grandfather of said child.

"4. That immediately thereafter, the said grandfather returned to his home in Gaston, Northampton County, North Carolina, bringing with him the said Jane Elizabeth Brewer. The domicile of the said George A. Brewer, Sr. is now and has been for more than twenty years, said Town of Gaston, Northampton County, North Carolina.

"5. That since said time the said Jane Elizabeth Brewer has been continuously residing in the home of her grandfather, George A. Brewer, Sr., in Gaston, Northampton County, North Carolina, and at no time has been out of the State of North Carolina.

"6. That immediately following the divorce decree on January 17, 1951, George A. Brewer, Jr. left the State of New York with the intention not to return, and has continuously resided since then in Gaston, North Carolina except for the times that he was on duty in the Navy; has voted in elections held in Gaston Precinct in 1952, 1954 and 1956; that since said time; and in the periods when he owned an automobile, such car has been registered in North Carolina with a North Carolina license plate and the same in the Town of Gaston; that since he left New York, he has paid his Federal income tax through the Greensboro, North Carolina office; that since he left New York, he has spent his leaves at his home in Gaston, North Carolina with his father, stepmother and child. That at all times since he left the State of New York, and now, George A. Brewer, Jr., has been and is a resident of and domiciled in Gaston, North Carolina.

"7. That George A. Brewer, Jr. is a Machinist Mate First Class in the U. S. Navy with a base pay of $258.00 per month, plus $77.10 for the maintenance of Jane Elizabeth Brewer. That he makes an allotment and pays monthly to his father the sum of $157.10 for the support and maintenance of Jane Elizabeth Brewer.

"8. That on October 2, 1951, and again on November 17, 1952, the petitioner made application in the Supreme Court of the State of New York for the modification of said divorce decree seeking custody of said child for the petitioner. Both applications were denied. That in July 1954, the petitioner married Joseph Kovacs, the person who was named as co-respondent in the divorce action hereinabove referred to, and the person whom the court found as the co-respondent. That in November 1954, the petitioner again applied to said New York Court for a modification of the divorce decree seeking custody of the child for herself. That upon a hearing upon said petition, the court entered a decree awarding such custody. At said hearing, neither George A. Brewer, Sr. nor George A. Brewer, Jr. appeared in person but did through counsel and each submitted affidavits which were considered by the court. The minor child, Jane Elizabeth Brewer, was not present in the State of New York at the time of said hearing, or at any time since her removal from said State in 1951. At the time of said hearing, and since 1951, she has been a resident of and domiciled in Gaston, North Carolina. That neither George A. Brewer, Sr. nor George A. Brewer, Jr. has been in the State of New York since 1951.

"9. That petitioner filed her petition in the present case in the Superior Court of Northampton County on the 24th day of February 1956, under the

provisions of Section 50-13 of the General Statutes of North Carolina; summons was personally served on the defendant on February 29, 1956; the defendant filed answer on March 29, 1956.

"10. That George A. Brewer, Sr. is 64 years of age and for more than one year has not required any care for a coronary artery condition or for a diabetic condition. He is able to work, and properly supervise the maintenance and care of his granddaughter, Jane Elizabeth Brewer; that he is senior trustee of the Board of Stewards, teacher of the adult Bible Class of his church school and an active and reliable layman of his church. He is vitally interested in the public schools of his community and in consequence of such church and school interest and activity the environment of his home is suitable for the upbringing of a child; that George A. Brewer, Sr. owns his residence. It is situated in the corporate limits of the Town of Gaston and located tastefully on a hill, is small, but adequate and neat. The home is attractive in appearance, comfortable and modest. It is complete with bath, hot and cold water, is heated with an oil heater floor furnace and has a gas heater in the fireplace which may be used as auxiliary heat in case of severe weather.

"That Mrs. George A. Brewer, Sr. is a graduate nurse of the Roanoke Rapids, N. C. Hospital, having graduated in 1927; that she is peculiarly qualified to give attention and care to said minor, Jane Elizabeth Brewer; that she has shown, and continues to show, affection and interest in said minor; that she is a teacher of small children in her church school. She is a gentle, loving person, fully qualified in every way to give Jane Elizabeth Brewer motherly care and Christian nurture and training that she needs at this period of her life.

"11. That Jane Elizabeth Brewer was about 5½ years of age when her custody was awarded to her grandfather, George A. Brewer, Sr.; that she has lived continuously since that time with her grandfather and step-grandmother; that she has been a constant attendant at church services and at church school. In church school she has been awarded a pin for uninterrupted attendance for a period of more than five years; that she has been a constant attendant in the local elementary school where she has proven to be a bright and attractive child. She has done well in the scholastic work and has been one of the top-ranking pupils. In 1954, she voluntarily made a public confession of Christ and joined the church of her grandparents of her own free will.

"Said minor is provided with a swing, toys, dolls and doll house and a playhouse. She has many young friends with whom she plays and visits. She has made and enjoys friends in the Town of Gaston not only among those of her age, but with adults also. Her health is good and she has had the doctor only twice since 1951, and that was for a minor upset stomach which lasted only a day. She has grown several inches in height and has gained in weight.

"She has advantages equal to those of any child in Gaston, good schools, supervised playground, recreational facilities, a good home and church training, and above all a sense of being loved and wanted.

"12. That in 1954, when the said New York decree was entered, there was residing in the home of George A. Brewer, Sr., himself, his wife and the son of Mrs. Brewer; that the son of Mrs. Brewer is no longer residing in said home, and it is now occupied only by Mr. and Mrs. George A. Brewer, Sr. and the said Jane Elizabeth Brewer. That the

removal of the son of Mrs. George A. Brewer, Sr. provides more space in the home for the convenience and comfort of said child, and lessens the responsibility of the said Mr. and Mrs. George A. Brewer, Sr. in providing maintenance and supervision for said minor.

"13. That the petitioner, Aida Kovacs, is not a fit and proper person to have the care, custody and control of the minor, Jane Elizabeth Brewer.

"14. That George A. Brewer, Sr. is a man of excellent character, good habits and conduct, and is a fit and suitable person to have the care, custody and control of the minor, Jane Elizabeth Brewer.

"15. That the welfare, interest and development of the child will be materially promoted by allowing her to remain in the custody of George A. Brewer, Sr. and in the environment to which she has become accustomed and upon which in a measure she depends."

The decree entered pursuant to the above findings, in pertinent part, is as follows:

"1. That this Court, in passing upon the care, custody and control of Jane Elizabeth Brewer, is not bound by or required to give effect to the decree of the Court of the State of New York made in 1954 and hereinbefore referred to.

"2. That the petitioner's petition to be awarded the care, custody and control of the said Jane Elizabeth Brewer is hereby denied.

"3. That the care, custody and control of the said Jane Elizabeth Brewer is hereby awarded to the respondent, George A. Brewer, Sr."

The petitioner appeals, assigning error.

SYLVESTER & HAIMOFF, of the New York Bar, SANFORD, PHILLIPS, MCCOY & WEAVER, for petitioner;

GAY & MIDYETTE, ERIC NORFLEET, for respondent.

DENNY, *J.* The appellant's first assignment of error is based on a single exception to the court's findings of fact numbered one through fifteen and does not point out wherein the findings of fact are not supported by the evidence. Therefore, the exception is broadside and this assignment of error presents nothing for review except whether or not the court's conclusions of law are supported by its findings. Winborne v. Stokes, 238 N. C. 414, 78 S. E. 2d 171; Burnsville v. Boone, 231 N. C. 577, 58 S. E. 2d 351.

The second assignment of error is based on an exception to his Honor's conclusion of law to the effect "that this court, in passing upon the care, custody and control of Jane Elizabeth Brewer, is not bound by nor required to give effect to the decree of the Court of the State of New York made in 1954, * * *."

Irrespective of the failure of the appellant to challenge by proper exceptions the sufficiency of the evidence to support the court's findings in the hearing below, we are of the opinion that the findings are supported by competent evidence and that they support the court's conclusion of law challenged by the second assignment of error, and we so hold. Hoskins v. Currin, 242 N. C. 432, 88 S. E. 2d 228.

The respondent, George A. Brewer, Sr., having been found to be a citizen and resident of North Carolina, domiciled in said State, to whom the custody of Jane Elizabeth Brewer, then 5½ years of age, was awarded, by the New York Court on 17 January 1951; and the said minor child having been a resident in the home of her grandfather, George A. Brewer, Sr., since September 1951; and her father, George A. Brewer, Jr., having been domiciled in North Carolina since immediately after January 1951, we

hold, in the light of these findings, that the courts of North Carolina have the power and authority to hear and determine the question of the custody and welfare of the minor child involved herein. Richter v. Harmon, 243 N. C. 373, 90 S. E. 2d 744; Hoskins v. Currin, supra; Gafford v. Phelps, 235 N. C. 218, 69 S. E. 2d 313; In re Biggers, 228 N. C. 743, 47 S. E. 2d 32; In re Ogden, 211 N. C. 100, 189 S. E. 119; In re Alderman, 157 N. C. 507, 73 S. E. 126, 39 L. R. A. (N. S.) 988.

We further hold that the modification of the 1951 decree made by the New York Court in 1954, has no extra-territorial effect, and we are not bound by the full faith and credit clause of the Constitution of the United States, Article IV, section 1, to recognize and enforce the modified decree. In re Alderman, supra; In re Biggers, supra; Hoskins v. Currin, supra.

An action which relates to the custody of a child is in the nature of an *in rem* proceeding. Therefore, the child is the *res* over which the court must have jurisdiction before it may enter a valid and enforceable order. Weddington v. Weddington, 243 N. C. 702, 92 S. E. 2d 71; Richter v. Harmon, supra; Hoskins v. Currin, supra; Coble v. Coble, 229 N. C. 81, 47 S. E. 2d 798.

The court below has found that the petitioner, Aida Kovacs, is not a fit and proper person to have the care, custody and control of the minor, Jane Elizabeth Brewer; on the other hand, it has found that George A. Brewer, Sr. is a man of excellent character, good habits and conduct and is a fit and suitable person to have the care and custody of said minor child. The welfare of the child in controversies involving custody is the polar star by which the courts must be guided in awarding custody. Smith v. Smith, 241 N. C. 307, 84 S. E. 2d 891; Griffin v. Griffin, 237 N. C. 404, 75 S. E. 2d 133; Gafford v. Phelps, supra; Walker v. Walker, 224 N. C. 751, 32 S. E. 2d 318; Story v. Story, 221 N. C. 114, 19 S. E. 2d 136.

The judgment of the court below is affirmed.

APPELLANT'S BRIEF

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IN THE

Supreme Court of the United States

October Term, 1957

No. 200

AIDA S. KOVACS,

Appellant,

against

GEORGE A. BREWER, SR.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

APPELLANT'S BRIEF

HARRIS B. STEINBERG,
25 Broad Street,
New York 5, New York,

and

SYLVESTER & HAIMOFF,
501 5th Avenue,
New York 17, New York,

Attorneys for Appellant.

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IN THE

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October Term, 1957

No. 200

AIDA S. KOVACS,

Appellant,

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GEORGE A. BREWER, SR.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

APPELLANT'S BRIEF

Statement

Appellant appeals from a judgment of the Supreme Court of North Carolina, entered on March 20, 1957.

Opinion Below

The opinion of the Supreme Court of North Carolina, printed in Appendix A hereto, pages 27-85, is reported in 245 North Carolina 630.

Jurisdiction

The judgment of the Supreme Court of North Carolina was entered on March 20, 1957 (R. 73). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254. This Court granted certiorari on October 14, 1957 (R. 75).

Question Presented

Whether an order of the New York Supreme Court in a divorce action, modifying its former judgment in respect of custody, is binding upon the Courts of North Carolina, under Article IV, Section 1 of the United States Constitution, where the parties appeared in the New York proceeding, but the child resided in and was physically present in North Carolina at the time of modification.

Constitutional Provision and Statutes Involved

Article IV, Section 1, of the Constitution, provides:

> "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, record and proceedings shall be proved and the effect thereof."

Congress, by the Act of May 26, 1790, C. 11, as amended, R. S. Sec. 905, 28 U. S. C. Sec. 687, declared that judgments:

> "shall have such faith and credit given to them in every Court within the United States as they have by law or usage in the Courts of the State from which they are taken."

Summary of Argument

The Supreme Court of North Carolina held that the New York order was not entitled to full faith and credit in North Carolina on the ground that an action relating to custody is an *in rem* proceeding; that the child is the *res;* and that therefore the New York Courts had no jurisdiction since the child was in North Carolina at the time the New York order was made.

It is the contention of appellant that where there is personal jurisdiction of the parties in a divorce proceeding, the power of the Court to make orders respecting the marital status, alimony and custody cannot be challenged (*Estin* v. *Estin,* 334 U. S. 541; *May* v. *Anderson,* 345 U. S. 528). The presence of the child is not a jurisdictional prerequisite where the parties are before the Court in such a proceeding. This is so despite the fact that the presence of the child in North Carolina is a basis for the exercise of independent jurisdiction by the North Carolina Court acting in the interest of the child upon the basis of changed circumstances since the New York decree (*Halvey* v. *Halvey,* 330 U. S. 610; *Finlay* v. *Finlay,* 240 N. Y. 249). There is no suggestion in the opinions of the Courts below that the decisions made were influenced in any degree by any change in circumstances.

In any event, respondent, having appeared in the New York suit and submitted affidavits in opposition to the motion for a change of custody, had ample opportunity to contest the jurisdiction of the New York Court. Having failed to challenge the jurisdiction, respondent is now precluded from raising that question (*Sherrer* v. *Sherrer,* 334 U. S. 343, 351; *Johnson* v. *Muelberger,* 340 U. S. 581).

Statement of Facts

On April 18, 1945, the appellant was married to George A. Brewer, Jr., in the City of New York, where they then resided (R. 13). They had one child, Jane Elizabeth Brewer, born on May 30, 1946, in New York (R. 13-14).

On January 17, 1951, a judgment of divorce was rendered by the New York Supreme Court against the appellant on the ground of her adultery (R. 7-8); and custody of the child was awarded to the child's paternal grandparent, George A. Brewer, Sr., a resident of North Carolina, because the child's father, plaintiff in the divorce action, was then and still is in the United States Navy (R. 8, 14). In awarding custody of the child to the paternal grandfather, Mr. Justice Walter of the New York Supreme Court stated (R. 46):

> "The question of the custody of the child remains. Even though I find defendant guilty of adultery, I would not, on that finding alone, take a four-year old girl from her mother if the mother's situation and surroundings were such as to promote the interest and well-being of the child. I think the best interests of the child require that she be placed in the custody of plaintiff's father (her paternal grandfather) and the plaintiff asks that be done at least until he is discharged from the Navy."

Thereafter, the appellant on October 2, 1951, and again on November 17, 1952, applied in the New York Supreme Court for an order modifying the decree to award her custody. Both applications, however, were denied (R. 15).

In July, 1954, the Petitioner married Joseph Kovacs, who was the co-respondent in the original divorce action (R. 15) and took up her residence with him in Riverdale, New York (R. 46).

Relying upon her remarriage and the resulting material improvement in her circumstances, the appellant again

applied in the New York Supreme Court on November 9, 1954, for a modification of the divorce decree to award her custody of the child (R. 15). The Brewers appeared in opposition, were represented by counsel and submitted answering affidavits (R. 9, 15).

This application was granted by Mr. Justice Brisach of the New York Supreme Court, who stated (R. 46):

> "Previous applications to modify this decision have been denied, presumably on the ground that there has been no material change in defendant's situation and surroundings. Defendant, however, is now remarried and is now living in an apartment in a desirable residential community in Riverdale, New York. Her situation is presently such as to permit the bringing up of the child, who is now eight years of age, in proper surroundings. The papers disclose that the plaintiff has re-enlisted and is now serving in the Navy and intends to continue such service and the infant is now living with her paternal grandfather, who is admittedly a diabetic and suffers from coronary thrombosis. The accommodations and surroundings of the mother are acceptable for the welfare of the infant and would be more desirable for an eight year old girl, whose bringing up belongs to her mother."

It was stipulated below that the Brewers refused to surrender the child, as directed by the New York decree (R. 21).

Thereupon, and on or about February 20, 1956, the appellant brought a proceeding in the Superior Court of North Carolina, under the provisions of Section 50-13 of the North Carolina General Statutes, which governs jurisdiction of controversies respecting the custody of children of parents divorced by courts of States other than North Carolina (R. 16).

The petition in the North Carolina proceeding set forth the facts with respect to the marriage of the parties in New York; the birth of the child; the divorce proceeding

and the award of custody to the paternal grandfather; the original applications which were denied (R. 2-3); and then alleged the following with respect to the New York order of modification (R. 3):

> "That after her remarriage, this petitioner once more, on November 9, 1954, applied to the aforesaid New York Court for a modification of the divorce decree to award custody of the child to her. That on December 23rd, 1954 this application was granted by order awarding custody of the child, Jane Elizabeth Brewer, to this petitioner. That the defendant herein, George A. Brewer, Sr., and his son George A. Brewer, Jr., former spouse of this petitioner, and father of the child, appeared in the proceeding by counsel; submitted to jurisdiction of the said New York Court on the question of custody therein raised, and submitted affidavits in opposition to the granting of the order. A copy of said order is attached hereto and made a part hereof, marked Exhibit B."

The petition then declared that the Brewers wrongfully refused to relinquish custody and control of the child, and that the decree of the New York Court was entitled to full faith and credit in North Carolina, stating (R. 3-4):

> "That this petitioner is informed and believes and therefore alleges that the decree of the New York Court dated December 23, 1954, is entitled to full faith and credit in the courts of North Carolina except as to matters showing changed circumstances since the date of such decree. And petitioner expressly pleads said New York decree as entitling her to custody of said child by judgment of this Court, in the absence of a showing by defendant of such changed circumstances."

The respondent, the paternal grandfather, by his answer, alleged that the child was not physically present in New York in December, 1954, when the New York order awarding custody to the appellant was made; that at the time of said order, the child's father resided in and was domiciled in the State of North Carolina; that the best

interests of the child would be served by allowing her to remain in the custody of the grandparent; and that the appellant was not a fit person to have custody of the child (R. 12-13).

No reference was made in the answer to any change of circumstances occurring since December 23, 1954, the date of the entry of the order of modification (R. 10-13)

The case was heard on September 12, 1956, at Winton, North Carolina before Judge Henry L. Stevens, Jr. By direction of the Court, the matter was heard solely on affidavits, the pleadings, certain stipulations and the exhibits annexed to the petition (R. 13).

At the hearing before Judge Stevens the appellant relied solely upon the New York order (R. 20). The respondent in the North Carolina Court offered in evidence a series of affidavits designed to show that the appellant was not a suitable person to have custody of the child (R. 47-63).

Thereafter, and on December 10, 1956, Judge Stevens rendered judgment denying the appellant's application for custody and deciding expressly that the North Carolina Court was "not bound by or required to give effect to the New York decree." As to this, the Court stated (R. 18):

> "That this Court, in passing upon the care, custody and control of Jane Elizabeth Brewer, is not bound by or required to give effect to the decree of the Court of the State of New York made in 1954 and hereinbefore referred to."

The only finding of the Court relating to a circumstance occurring subsequent to the entry of the New York judgment related to the fact that in 1954, when the New York decree was entered, the son of Mrs. Brewer was living with the parties, whereas at the time of the North Carolina

proceeding, he was no longer living with them. The Court stated (R. 17):

> "That the removal of the son of Mrs. George A. Brewer, Sr. provides more space in the home for the convenience and comfort of said child, and lessens the responsibility of the said Mr. and Mrs. George A. Brewer, Sr. in providing maintenance and supervision for said minor."

An appeal to the Supreme Court of North Carolina was thereafter duly taken and was heard on or about February 27, 1957 (R. 74).

The North Carolina Supreme Court, affirming the decision of the Superior Court, held that it was not bound to give any effect to the New York decree. The Court stated (R. 72-73):

> "We further hold that the modification of the 1951 decree made by the New York Court in 1954, has no extra-territorial effect, and we are not bound by the full faith and credit clause of the Constitution of the United States, Article IV, section 1, to recognize and enforce the modified decree. In re Alderman, supra; In re Biggers, supra; Hoskins v. Currin, supra.
>
> "An action which relates to the custody of a child is in the nature of an *in rem* proceeding. Therefore, the child is the *res* over which the court must have jurisdiction before it may enter a valid and enforceable order. Weddington v. Weddington, 243 N. C. 702, 92 S. E. 2d 71; Richter v. Harmon, supra; Hoskins v. Currin, supra; Coble v. Coble, 229 N. C. 81, 47 S. E. 2d 798."

POINT I

The North Carolina decision is in conflict with decisions of the United States Supreme Court.

The jurisdiction of the Court of any State to render a valid divorce decree affecting marital status, alimony and custody of children has never been questioned where husband and wife appeared or were served in the state (*May* v. *Anderson*, 345 U. S. 528). Jurisdiction *in personam* is essential where the decree purports to affect alimony or custody (*Estin* v. *Estin*, 334 U. S. 541; *May* v. *Anderson, supra*). But where there is personal jurisdiction of both parties, the power of the Court to dispose of all of the issues incident to the divorce proceedings, including alimony and custody, has never been challenged (*Estin* v. *Estin, supra; May* v. *Anderson, supra*).

In respect of custody, the Supreme Court has equated "the jurisdictional requirements for a custody decree to those for an *in personam* judgment" (Mr. Justice Jackson, dissenting, in *May* v. *Anderson, supra*). The decisions which have had the effect of equating these jurisdictional requirements, all of which were ignored by the North Carolina Supreme Court, may be briefly reviewed.

In *Estin* v. *Estin*, 334 U. S. 541, an alimony decree rendered in favor of the wife in a New York separation suit was followed by a Nevada divorce obtained by the husband, without personal service of the wife, which purported to nullify the New York alimony order. Holding that this could not be accomplished without personal jurisdiction of the wife, the Court said, at pages 548, 549:

> "The Nevada decree that is said to wipe out respondent's claim for alimony under the New York judgment is nothing less than an attempt by Nevada to restrain respondent from asserting her claim under that judgment. That is an attempt to exercise an *in personam* jurisdiction over a person not before

> the court. That may not be done. Since Nevada had no power to adjudicate respondent's rights in the New York judgment, New York need not give full faith and credit to that phase of Nevada's judgment. A judgment of a court having no jurisdiction to render it is not entitled to the full faith and credit which the Constitution and statute of the United States demand. *Hansberry* v. *Lee*, 311 U. S. 32, 40-41; *Williams* v. *North Carolina*, 325 U. S. 226, 229, and cases cited."

Similarly, in *Armstrong v. Armstrong*, 350 U. S. 568 the Court held that a Florida divorce, obtained on constructive service, which made no alimony award, could not preclude the wife, an Ohio resident, from obtaining an alimony award in Ohio, as an incident to her divorce action in that State, though no divorce decree could be rendered in Ohio in view of the valid Florida divorce. In its opinion, the Court said, at page 576:

> "It has been the constitutional rule in this country at least since Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565, decided in 1878, that non-residents cannot be subjected to personal judgments without such service or appearance. We held in Estin v. Estin, 334 U. S. 541, 92 L. ed. 1561, 68 S. Ct. 1213, 1 A. L. R. 2d 1412, that an alimony judgment was this kind of 'personal judgment.'"

In *May* v. *Anderson*, 345 U. S. 528, cited by the United States Supreme Court in the *Armstrong* case, *supra*, the Court "equated" the jurisdictional requirements of alimony cases to custody cases. There the parties were married and lived in Wisconsin until they separated by consent in December, 1946, the wife taking the children to Ohio to consider "her future course". When she decided not to return to Wisconsin, the husband brought an action for divorce in Wisconsin seeking custody of the children, in which she was not personally served. The Wisconsin Court entered a divorce decree, awarding custody of the children to the husband. Armed with this decree, the husband obtained the children, bringing them back to Wisconsin.

Some years later, he brought them to Ohio for a visit with the mother, whereupon she refused to surrender them. The husband then brought a *habeas corpus* proceeding in Ohio. The Ohio Court directed the wife to surrender the children to the husband, holding the Wisconsin judgment binding under the full faith and credit clause.

The Supreme Court reversed, ruling that the original Wisconsin decree was not binding upon the wife because she had not been served with process in Wisconsin. The fact that the children were domiciled in Wisconsin and that the parties had stipulated that the domicile of both parents continued to be in Wisconsin, was held not sufficient to require enforcement of the Wisconsin decree in the absence of personal service upon the wife. In its opinion, the Court said, per Mr. Justice Burton, at page 534:

> "In the instant case, we recognize that a mother's right to custody of her children is a personal right entitled to at least as much protection as her right to alimony.
>
> "In the instant case, the Ohio courts gave weight to appellee's contention that the Wisconsin award of custody binds appellant because, at the time it was issued, her children had a technical domicile in Wisconsin, although they were neither resident nor present there. We find it unnecessary to determine the children's legal domicile, because, even if it be with their father, that does not give Wisconsin, certainly as against Ohio, the personal jurisdiction that it must have in order to deprive their mother of her personal right to their immediate possession."

The Court accordingly held that Wisconsin was without jurisdiction to make a custody award, not because the children were in Ohio, but because the wife was.

Thus, the jurisdictional requirement of personal service upon, or an appearance by, the non-resident spouse, established in the alimony cases (*Estin* v. *Estin*, 334 U. S. 541)

has expressly been made applicable to custody cases (*May* v. *Anderson, supra*); and as recently as April 1956, the Supreme Court cited *May* v. *Anderson*, a custody case, in dealing with an alimony award (*Armstrong* v. *Armstrong, supra*). Thus, as was pointed out by Mr. Justice Jackson in his dissenting opinion in *May* v. *Anderson*, the Supreme Court has "equated" the jurisdictional requirements of alimony and custody cases, stating (345 U. S. at page 540):

> "In spite of the fact that judges and law writers long have recognized the similarity between the jurisdictional requirements for divorce and for custody, this decision appears to equate the jurisdictional requirements for a custody decree to those for an *in personam* money judgment."

In *Vanderbilt* v. *Vanderbilt*, 354 U. S. 416, this Court applied the *Estin* rule to a case in which the wife's right to alimony had not been reduced to judgment at the time of the Nevada divorce decree rendered without personal jurisdiction over her, and held enforceable accordingly a New York alimony order rendered in a subsequent separation action in New York. In his dissenting opinion in that case, Mr. Justice Frankfurter, differing from the majority of the Court as to the extraterritorial effect of the Nevada divorce decree, took occasion to point out that custody was a different matter, indicating that when children were involved, personal jurisdiction of both parties would be deemed a constitutional prerequisite. Mr. Justice Frankfurter stated further that while a divorce decree may terminate the relations of the parties as husband and wife, the decree could not terminate their relations to their children. Parental rights, therefore, are not to be affected except when the parents are before the Court. Clearly, however, when the parents are, in fact, before the Court in a divorce suit, there can be no question of its jurisdiction to make any order with respect to the custody of the children as an incident to the divorce proceeding.

While the absence of the child from the State is therefore irrelevant in a divorce proceeding, it does not follow that the presence of the child in North Carolina is without jurisdictional significance. A North Carolina court, acting in its capacity as *parens patriae*, may intervene in the interests of the child upon the basis of changed circumstances since the New York decree. This is a parallel and independent basis of jurisdiction, apart from the custody jurisdiction incidental to a divorce proceeding (*Finlay* v. *Finlay*, 240 N. Y. 249). The physical presence of the child within the state serves as the origin of this type of jurisdiction, which is founded upon the power of a state to regulate the custody of infants found within its territory. It has no relation to custody awards in divorce proceedings. In *Finlay* v. *Finlay*, *supra*, the Court said, per Cardozo, J., at pages 431, 432:

> "The jurisdiction of a State to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless (*Woodworth* v. *Spring*, 4 Allen, 321, 323; *White* v. *White*, 77 N. H. 26; *Hanrahan* v. *Sears*, 72 N. H. 71, 72; *Matter of Hubbard*, 82 N. Y. 90, 93).
>
> For this, the residence of the child suffices though the domicile be elsewhere (*Matter of Hubbard*, *supra*). But the limits of the jurisdiction are suggested by its origin. The residence of the child may not be used as a pretense for the adjudication of the status of parents whose domicile is elsewhere, nor for the definition of parental rights dependent upon status (cf. *Kline* v. *Kline*, 57 Ia. 386; *Griffin* v. *Griffin*, 93 Oreg. 78; *Lanning* v. *Gregory*, 100 Tex. 310; *Blackinton* v. *Blackinton*, 141 Mass. 432, 436; *Matter of Standish*, 197 App. Div. 176). Parents so situated must settle their controversies at home. Our courts will hold aloof when intervention is unnecessary for the welfare of the child.
>
> "We think the welfare of children does not appear from the complaint to be the basis of the husband's

prayer for an apportionment of parental rights, nor is an action between contending spouses the proper form of remedy.

"One situation there is, indeed, in which such an inquiry will be pursued in connection with an action between the spouses, or as a supplement thereto. The statute permits a judgment fixing the custody of children as an incident to a judgment for divorce or separation."

The physical presence of the child suffices as a ground of jurisdiction where intervention is necessary for the child's protection. It is not material where the parental rights of custody are to be adjudicated as incident to a divorce action.

The jurisdiction which may be exercised by the Court in the face of a prior foreign custody award was described in *Halvey* v. *Halvey*, 330 U. S. 610. There, the parties having been married in New York, the wife took their child to Florida, established her residence there and obtained a decree of divorce which awarded her custody of the child. The day before the Florida decree was entered, the husband took the child back to New York without the wife's knowledge. Thereupon, the wife instituted habeas corpus proceedings in New York, seeking to enforce the Florida decree awarding her custody. The United States Supreme Court held that the New York Court had the same power to modify the custody decree as the Florida court would have had on the basis of proof not previously considered. In defining the proper scope of the jurisdiction exercisable by the New York Court under the full faith and credit clause, the Court said, per Mr. Justice Douglas, at page 613:

"Facts which have arisen since the original decree are one basis for modification of the custody decree. *Frazier* v. *Frazier*, 109 Fla., p. 168, 147 So., p. 465; *Jones* v. *Jones*, 156 Fla. 524, 527, 23 So. 2d 623, 625. But the power is not so restricted. It was held in *Meadows* v. *Meadows*, 78 Fla. 576, 83 So. 392-393, that 'the proper custody of the minor child is a

> proper subject for consideration by the chancellor at any time, even if facts in issue could have been considered at a previous hearing, *if such facts were not* presented or considered at a former hearing'."

This, the Court held, constituted compliance with the full faith and credit clause, stating (p. 614):

> "So far as the Full Faith and Credit Clause is concerned, what Florida could do in modifying the decree, New York may do. * * * But a judgment has no constitutional claim to a more conclusive or final effect in the State of the forum than it has in the State where rendered."

This does not mean that the issues tried in New York may be relitigated in North Carolina. The policy of the full faith and credit clause is the restriction of repetitive litigation. In *Halvey* v. *Halvey, supra*, Mr. Justice Frankfurter stated (p. 616):

> "The constitutional policy formulated by the Full Faith and Credit Clause cannot be fitted into tight little categories or to abstract generalities. That policy was the nation-wide restriction of litigousness, to the extent that States, autonomous for certain purposes, should not be exploited to permit repetitive litigation. In substance, the Framers deemed it against the national welfare for a controversy that was truly litigated in one State to be relitigated in another. Such limitation does not foreclose inquiry into what was litigated and what was adjudicated. The scope of the Full Faith and Credit Clause is bounded by its underlying policy and not by procedural considerations unrelated to it."

In applying this constitutional prohibition against duplicate litigation in custody matters, Mr. Justice Frankfurter stated (617):

> "The child's welfare must be the controlling consideration whenever a court which can actually lay hold

> of a child is appealed to on behalf of the child. Short of that, a valid custodial decree by Florida could not be set aside simply because a New York court, on independent consideration, has its own view of what custody would be appropriate."

It is respectfully submitted that the decision of the North Carolina Court has, in effect, set aside the New York order merely because the North Carolina Court "on independent consideration (had) its own view of what custody would be appropriate." No reference was made in the decision of the North Carolina Supreme Court to any intervening change of circumstances warranting a reversal of the New York decree awarding custody to the wife. The fact that a stepson of Brewer, Sr., had moved out was not referred to by the Supreme Court.

On the contrary, both the Superior Court and the Supreme Court (*supra*, pp. 7, 8) stated that they were not required to give any effect to the New York judgment. This is a palpable violation of the Full Faith and Credit Clause.

The question as to the effect upon jurisdiction of the absence of the child from the forum state was expressly reserved in *Halvey* v. *Halvey*, *supra*, where the husband had "abducted" the child to New York the day before the Florida decree was entered.

The Supreme Court stated at pages 615, 616:

> "The narrow ground on which we rest the decision makes it unnecessary for us to consider several other questions argued, *e.g.*, whether Florida at the time of the original decree had jurisdiction over the child, the father having removed him from the State after the proceedings started but before the decree was entered; * * * whether the State which has jurisdiction over the child may, regardless of a custody decree rendered by another State, make such orders concerning custody as the welfare of the child from time to time requires. On all these problems we reserve decision."

It is respectfully submitted that there is no justification, in principle, for a requirement of the physical presence or domicile of the child where the Court has jurisdiction of the parents in a divorce proceeding. Jurisdiction basically is a matter of due process, involving essentially notice and hearing (*Pennoyer* v. *Neff*, 95 U. S. 714; *Williams* v. *North Carolina*, 317 U. S. 287). As was stated by Mr. Justice Frankfurter in *Vanderbilt* v. *Vanderbilt*, *supra*, dissenting at pages 423-4: "The crucial question is: what is the fair way to proceed against these interests?"

The child clearly has no need for notice or hearing, where his parents are before the Court.

It is accordingly respectfully submitted that the decision of the North Carolina Supreme Court violates the Full Faith and Credit Clause of the United States Constitution.

POINT II

The question of the jurisdiction of the New York court is *res adjudicata*.

Moreover, the question of the jurisdiction of the New York Court was not open to defendant in the North Carolina proceeding. The Brewers participated in the New York proceeding and had full opportunity to contest that Court's jurisdiction. Having failed to do so they are precluded by the New York determination (*Sherrer* v. *Sherrer*, 334 U. S. 343, 351; *Johnson* v. *Muelberger*, 340 U. S. 581; *Cook* v. *Cook*, 342 U. S. 126; *Davis* v. *Davis*, 305 U. S. 32). Defendant's neglect in New York is not the basis for attacking the New York decree in North Carolina. In *Sherrer* v. *Sherrer*, *supra*, the Court said at page 352:

> "If respondent failed to take advantage of the opportunities afforded him, the responsibility is his own. We do not believe that the dereliction of a defendant under such circumstances should be permitted to provide a basis for subsequent attack in

> the courts of a sister State on a decree valid in the State in which it was rendered."

The Court pointed out that the doctrine of *res judicata* applies to adjudications relating either to jurisdiction of the person or of the subject matter where the parties were given full opportunity to litigate. The Court said at page 350:

> "Insofar as cases originating in the federal courts are concerned, the rule has evolved that the doctrine of *res judicata* applies to adjudications relating either to jurisdiction of the person or of the subject matter where such adjudications have been made in proceedings in which those questions were in issue and in which the parties were given full opportunity to litigate."

Applying this general principle to cases arising under the full faith and credit clause, the Court said at pages 351, 352:

> "We believe that the decision of this Court in the *Davis* case and those in related situations are clearly indicative of the result to be reached here. Those cases stand for the proposition that the requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister State where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree."

In *Johnson* v. *Muelberger*, 340 U. S. 581, the Court quoted the following principle from *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 78 (340 U. S. p. 585):

> "'One trial of an issue is enough. "The principle of *res judicata* apply to questions of jurisdiction as well as to other issues," as well to jurisdiction of the subject matter as of the parties.'"

POINT III

The validity of the New York judgment, under New York law, has not been challenged.

There is no doubt that the modification of the custody award is valid in New York, despite the absence of the child at the time of the modification (*May* v. *May*, 233 N. Y. App. Div. 519 (1st Dept.); *People* v. *Winton*, 34 Misc. 21, aff'd 61 App. Div. 615; *Grenier* v. *Grenier*, 175 Misc. 406; and see *Langerman* v. *Langerman*, 303 N. Y. 465; *Ansorge* v. *Armour*, 267 N. Y. 492, 498):

In *May* v. *May*, *supra*, the Court said, at page 520:

> "It is true that where both parties are before the court, custody of a child or children without the jurisdiction may be made."

POINT IV

The North Carolina Decisions.

Although the decisions of the North Carolina courts are, of course, not binding here, we submit herewith a brief summary of pertinent North Carolina decisions for the purpose of establishing that even in North Carolina, there is no actual decision that a foreign custody award, valid in the State where made, will be disregarded in North Carolina merely because the child was not present in the State. Prior custody awards have been held not controlling in North Carolina because of changed circumstances since the prior decree (*Richter* v. *Harmon*, 243 N. C. 373, 90 S. E. 2d 744; *Ex parte Alderman*, 157 N. C. 507, 73 S. E. 126); or because the prior award was based on a contract between the parties (*Gafford* v. *Phelps*, 235 N. C. 218, 69 S. E. 2d 313); or because one of the parties was not personally served (*Coble* v. *Coble*, 229 N. C. 81, 47 S. E. 2d 798; *Burrowes* v. *Burrowes*, 210 N. C. 788, 188 S. E. 648); or because

the husband and child were not domiciled in the foreign State when the divorce action was originally instituted (*Hoskins* v. *Currin*, 242 N. C. 432, 88 S. E. 2d 228); or because a North Carolina award, and not that of a sister State, was involved (*Weddington* v. *Weddington*, 243 N. C. 702, 92 S. E. 2d 71).

In *Richter* v. *Harmon*, 243 N. C. 373, 90 S. E. 2d 744, the parties were divorced in Florida, the husband being served by publication and the judgment awarding custody of the child to the wife. In the following year, the wife went to Washington, D. C. to seek employment, and with her consent, the husband brought the child to North Carolina.

In 1955, after the wife had remarried in Maryland, she brought a proceeding in North Carolina to enforce the Florida judgment awarding her custody. The actual holding was that the Florida judgment was entitled to full faith and credit in North Carolina as to all matters previously adjudicated. The Court said (90 S. E. 2d), at page 748:

> "But, in disposing of the custody of the minor child in controversy, the Florida decree awarding her custody to the petitioner is entitled to full faith and credit as to all matters existing when the decree was entered and which were or might have been adjudicated therein."

The Court also held, however, that since the child was then in North Carolina, the Court had the right to consider "any change of circumstances that have arisen since the entry of the Florida decree".

It is significant that the Florida judgment was deemed binding despite the absence of personal service on the husband. To this extent, the decision conflicts with *May* v. *Anderson*, 345 U. S. 528.

Ex parte Alderman, 157 N. C. 507, 73 S. E. 126, merely holds that when a child becomes a citizen of North Caro-

lina, its courts may exercise custody jurisdiction upon the basis of changed circumstances since the prior decree. There, the parties were married and divorced in Florida, the decree awarding custody of the child, then living in North Carolina, to the wife and providing certain visitation privileges to the husband. The husband brought a writ of habeas corpus in North Carolina to enforce his visitation privileges, relying upon the Florida decree. The facts established that the child's health at the time of the application was such that it would endanger its welfare to bring the child "from the mountains of western North Carolina to the State of Florida". Upon the basis of this proof, not presented to the Florida court, the husband's writ was dismissed, the Court holding that the Florida decree did not "give a husband a vested interest in the child". The Court said (73 S. E. page 129):

> "The child is *now* a citizen of North Carolina, and as such peculiarly under its guardianship, and the courts of this state will not remand it to the jurisdiction of another state, especially where, as in this case, it is so manifestly against the true interests of the child. 'Minors are the wards of the nation, and even the control of them by parents is subject to the unlimited supervisory control of the State'." (Citing authorities.)

Coble v. *Coble*, 229 N. C. 81, 47 S. E. 2d 798, vacated a custody award made without personal service on the wife. There the plaintiff husband, a North Carolina resident, sued for divorce and custody of his two minor children in North Carolina, although at the time the action was commenced, his wife and children were not within the State and the wife was not served. Nevertheless, an order was made awarding custody of the children to the plaintiff. The Supreme Court vacated this order upon the ground that the wife had not been served with process. The Court said, 47 S. E. 2d, at page 800:

> "At the time the order was issued, the res was not within the jurisdiction of the court. *The defendant-*

> *custodian was not served with notice* and was not accorded an opportunity to be heard. This runs counter to the genius of a free people and will not be permitted. The order is void. * * *
>
> "'It lies at the foundation of justice, that every person who is to be affected by an adjudication should have the opportunity of being heard in defense, both in repelling the allegations of fact, and upon the matter of law * * *.' Pridgen v. Pridgen, supra (203 N. C. 533, 166 S. E. 594)." (Our italics.)

Indeed, the Court indicated that had the wife been served, jurisdiction could have been exercised even in the absence of the children. Thus, the Court stated (page 801):

> "If both parents are in court and subject to its jurisdiction, an order may be entered, in proper instances, binding the parties and enforceable through its coercive jurisdiction. McRary v. McRary, supra. But such is not the case here. Neither the infants *nor* their mother was subject to the jurisdiction of the court at the time the order was entered." (Our italics.)

The Court, in the *Coble* case, therefore clearly held that where "both parents are in Court and subject to its jurisdiction", a custody award may be made, enforceable through the coercive jurisdiction of the Court, irrespective of the absence of the children.

In *Burrowes* v. *Burrowes*, 210 N. C. 788, 188 S. E. 648, a custody award also made without service of process upon the wife, was similarly vacated. Moreover, neither the plaintiff, the defendant, nor the child were residents of North Carolina.

In *Gafford* v. *Phelps*, 235 N. C. 218, 69 S. E. 2d 313, the parties were married in North Carolina in 1941, where they resided until 1944, when they went to live in Alabama with their child. On June 18, 1948, a separation agreement was entered into in Alabama, which provided for a sharing

of custody between the parties, which agreement was embodied in an Alabama divorce decree, rendered on June 25, 1948, the child being in North Carolina at the time of the decree. The Court pointed out that the prior award had been founded on a contract of the parties, which could not bind the Court in its review of evidence submitted bearing upon the welfare of the child. It said (69 S. E. 2d, at page 316):

> "The welfare of the child should be the paramount consideration which guides the court in making an award of custody. (Citing cases.)"

This case is squarely within the rule of *Halvey* v. *Halvey, supra*, which authorizes the Court to take proof, in the face of a prior custody award, where the evidence has not previously been considered. Obviously, where the custody award is based upon the contract of the parties, there has been no prior judicial inquiry into the facts.

In *Hoskins* v. *Currin*, 242 N. C. 432, 88 S. E. 2d 228, the parties were married in California in 1947, moved to Washington, D. C., in 1951, where they separated, and in 1952, the wife, having returned to California, brought suit for divorce there. The husband cross-claimed for divorce and in 1953, judgment was rendered in his favor, custody of the child being awarded to him, and since he was in the Marines, the Court directed that the child stay in North Carolina with the husband's brother and sister-in-law. In 1954, after the wife remarried, the California Court, on motion by the wife, modified its previous order and awarded her custody. The California order was held not entitled to full faith and credit in North Carolina because husband and child had been domiciled in North Carolina prior to the institution of the California divorce suit. The Court said (88 S. E. 2d), at page 232:

> "In the light of the finding of the court below that North Carolina is the legal domicile of the intervenor who has had the legal custody of Rodney Alan

> Currin since 16th March, 1953; and the further fact that he has been in the physical custody of the defendants in Granville County, North Carolina, since the 2nd day of March, 1952, which antedates the institution of the California action, we hold the California decree is not binding on the courts of this State."

This case, therefore, merely holds that North Carolina is not bound by the California modification of its custody award, where neither the husband nor the child were domiciled in California when the divorce suit was originally instituted.

In *Weddington* v. *Weddington*, 243 N. C. 702, 92 S. E. 2d 71, the parties, residents of North Carolina, separated in 1952 and in a habeas corpus proceeding, custody of the two children was divided between husband and wife, one to each. In the divorce action brought in North Carolina, the plaintiff wife moved to obtain custody of the child previously awarded her husband, the child being then in South Carolina. Her motion was granted, the husband being ordered to bring the child to North Carolina. Holding that the Court had no power to make this direction, the Court said (92 S. E. 2d) at page 74:

> "If both parents are in court and subject to its jurisdiction, an order may be entered in proper instances, binding the parties and enforceable through its coercive jurisdiction. McRary v. McRary, supra; Coble v. Coble, supra. On the other hand, if the child is not within the jurisdiction of the court, the Court is without power to make an order awarding the child's custody. Gafford v. Phelps, 235 N. C. 218, 69 S. E. 2d 313 and cases cited."

It may well be that the courts of North Carolina have determined, as a matter of discretion, not to exercise their custody jurisdiction where the child is not within North Carolina. Such a determination clearly does not bind any other State.

It should be emphasized that there is no North Carolina decision in which the Court has had occasion to pass upon the binding effect of a foreign custody award where the issue of custody was litigated and all of the facts extensively reviewed in a closely contested proceeding.

Nor has there been any decision in North Carolina involving the modification by a foreign tribunal of a judgment originally rendered by that court in a divorce action where both the parties and the child were then before the court.

Particular emphasis is laid upon the fact that the New York judgment here involved represents a modification of a prior judgment rendered when husband, wife and child were all domiciled and present in New York and the modification is pursuant to a retained statutory authority to modify the judgment. On this point, the overwhelming weight of authority is to the effect that the courts have a continuing jurisdiction to modify provisions relating to custody of children contained in final divorce judgments, which is not defeated by the removal of the child from the State (*Andrews* v. *Andrews*, 15 Ia. 423; *Meredith* v. *Krauthoff*, 191 Mo. App. 149, 177 S. W. 1122; *Dixon* v. *Dixon*, 76 N. J. Eq. 364, 74 Atl. 995; *Newman* v. *Newman*, 105 App. Div. 63, 93 N. Y. Supp. 847; *Berry* v. *Berry*, 60 N. D. 353, 234 N. W. 52; *Kern* v. *Lindsey*, 182 Va. 775, 30 S. E. 2d 707; *Coats* v. *Coats*, 161 Kan. 307, 167 Pac. 2d 290; *Drew* v. *Drew*, 186 S. W. 2d 858 (Mo. App.); *Stetson* v. *Stetson*, 80 Me. 483, 15 Atl. 60; *Hersey* v. *Hersey*, 271 Mass. 545, 171 N. E. 815; *Tinker* v. *Tinker*, 144 Okla. 97, 290 P. 185).

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of North Carolina should be reversed and a judgment should be made by this Court decreeing that the order of the New York Supreme Court, awarding custody of the child of the parties to appellant, is entitled to full faith and credit in North Carolina.

Respectfully submitted,

HARRIS B. STEINBERG,
25 Broad Street,
New York 5, New York,

and

SYLVESTER & HAIMOFF,
501 5th Avenue,
New York 17, New York,

Attorneys for Appellant.

Appendix A

(Opinion of Supreme Court of North Carolina)

IN THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM—1957

No. 168—Northampton

AIDA S. KOVACS

—v.—

GEORGE A. BREWER, SR.

Appeal by petitioner from Stevens, J., at Chambers in Winton, North Carolina, 12 September 1956. From Northampton.

This is a proceeding brought pursuant to GS 50-13 to determine a dispute concerning the custody of the minor child of the parents who were divorced by a decree of the State of New York.

The order entered pursuant to the hearing in Winton, North Carolina, on 12 September 1956, was signed by consent of counsel at Halifax on 10 December 1956.

This matter was heard before his Honor Henry L. Stevens, Jr., Judge regularly assigned and holding courts of the Sixth Judicial District, at which time and place the petitioner was present and represented by counsel, and the respondent was present and represented by counsel. The minor child, who is the subject of this controversy, was also present, as was her father, George A. Brewer, Jr.

By direction of the court the matter was heard solely on affidavits, pleadings, certain stipulations and petitioner's

exhibits, and upon consideration thereof the court found the facts as follows:

"1. That George A. Brewer, Jr., father of Jane Elizabeth Brewer, the minor child who is the subject of this controversy, enlisted in the U. S. Navy in 1946 and has been a member of such service since that date.

"2. That on April 18, 1945, the said George A. Brewer, Jr. married Aida Speciale (now Aida Kovacs). On May 30, 1946, a child, Jane Elizabeth Brewer, was born to said marriage. That they lived together in the marital relation until some time in 1950. That on July 31, 1950, George A. Brewer, Jr. instituted an action for divorce against his wife on the grounds of adultery in the Supreme Court of the State of New York in and for the County of New York. That on January 17, 1951, said Court entered a decree of divorce in favor of George A. Brewer, Jr. against his said wife on the grounds of adultery with Joseph Kovacs, and awarded the custody of the child, Jane Elizabeth Brewer, to George A. Brewer, Sr., the father of George A. Brewer, Jr., and the grandfather of said child.

"3. That immediately after rendition of the decree awarding custody of said child, the said Aida Brewer went into hiding, taking the child with her, and it was not until on or about September 6, 1951 that said father or grandfather were able to find the child and her mother. They were found living with Joseph Kovacs at 21 James Avenue in Jersey City and in order to gain the physical custody of the said child, it was necessary for the parent and grandparent to obtain a writ of habeas corpus in the Superior Court Chancery Division of Jersey City. Upon a hearing on the return of said writ, physical

possession and custody of said minor was granted to the father and grandfather of said child.

"4. That immediately thereafter, the said grandfather returned to his home in Gaston, Northampton County, North Carolina, bringing with him the said Jane Elizabeth Brewer. The domicile of the said George A. Brewer, Sr. is now and has been for more than twenty years, said Town of Gaston, Northampton County, North Carolina.

"5. That since said time the said Jane Elizabeth Brewer has been continuously residing in the home of her grandfather, George A. Brewer, Sr., in Gaston, Northampton County, North Carolina, and at no time has been out of the State of North Carolina.

"6. That immediately following the divorce decree on January 17, 1951, George A. Brewer, Jr. left the State of New York with the intention not to return, and has continuously resided since then in Gaston, North Carolina except for the times that he was on duty in the Navy; has voted in elections held in Gaston Precinct in 1952, 1954 and 1956; that since said time, and in the periods when he owned an automobile, such car has been registered in North Carolina with a North Carolina license plate and the same in the Town of Gaston; that since he left New York, he has paid his Federal income tax through the Greensboro, North Carolina office; that since he left New York, he has spent his leaves at his home in Gaston, North Carolina with his father, stepmother and child. That at all times since he left the State of New York, and now, George A. Brewer, Jr., has been and is a resident of and domiciled in Gaston, North Carolina.

"7. That George A. Brewer, Jr. is a Machinist Mate First Class in the U. S. Navy with a base pay

of $258.00 per month, plus $77.10 for the maintenance of Jane Elizabeth Brewer. That he makes an allotment and pays monthly to his father the sum of $157.10 for the support and maintenance of Jane Elizabeth Brewer.

"8. That on October 2, 1951, and again on November 17, 1952, the petitioner made application in the Supreme Court of the State of New York for the modification of said divorce decree seeking custody of said child for the petitioner. Both applications were denied. That in July 1954, the petitioner married Joseph Kovacs, the person who was named as co-respondent in the divorce action hereinabove referred to, and the person whom the court found as the co-respondent. That in November 1954, the petitioner again applied to said New York Court for a modification of the divorce decree seeking custody of the child for herself. That upon a hearing upon said petition, the court entered a decree awarding such custody. At said hearing, neither George A. Brewer, Sr. nor George A. Brewer, Jr. appeared in person but did through counsel and each submitted affidavits which were considered by the court. The minor child, Jane Elizabeth Brewer, was not present in the State of New York at the time of said hearing, or at any time since her removal from said State in 1951. At the time of said hearing, and since 1951, she has been a resident of and domiciled in Gaston, North Carolina. That neither George A. Brewer, Sr. nor George A. Brewer, Jr. has been in the State of New York since 1951.

"9. That petitioner filed her petition in the present case in the Superior Court of Northampton County on the 24th day of February 1956, under the provisions of Section 50-13 of the General Statutes of North Carolina; summons was personally served

on the defendant on February 29, 1956; the defendant filed answer on March 29, 1956.

"10. That George A. Brewer, Sr. is 64 years of age and for more than one year has not required any care for a coronary artery condition or for a diabetic condition. He is able to work, and properly supervise the maintenance and care of his granddaughter, Jane Elizabeth Brewer; that he is senior trustee of the Board of Stewards, teacher of the adult Bible Class of his church school and an active and reliable layman of his church. He is vitally interested in the public schools of his community and in consequence of such church and school interest and activity the environment of his home is suitable for the upbringing of a child; that George A. Brewer, Sr. owns his residence. It is situated in the corporate limits of the Town of Gaston and located tastefully on a hill, is small, but adequate and neat. The home is attractive in appearance, comfortable and modest. It is complete with bath, hot and cold water, is heated with an oil heater floor furnace and has a gas heater in the fireplace which may be used as auxiliary heat in case of severe weather.

"That Mrs. George A. Brewer, Sr. is a graduate nurse of the Roanoke Rapids, N. C. Hospital, having graduated in 1927; that she is peculiarly qualified to give attention and care to said minor, Jane Elizabeth Brewer; that she has shown, and continues to show, affection and interest in said minor; that she is a teacher of small children in her church school. She is a gentle, loving person, fully qualified in every way to give Jane Elizabeth Brewer motherly care and Christian nurture and training that she needs at this period of her life.

"11. That Jane Elizabeth Brewer was about 5½ years of age when her custody was awarded to her grandfather, George A. Brewer, Sr.; that she has lived continuously since that time with her grandfather and step-grandmother; that she has been a constant attendant at church services and at church school. In church school she has been awarded a pin for uninterrupted attendance for a period of more than five years; that she has been a constant attendant in the local elementary school where she has proven to be a bright and attractive child. She has done well in the scholastic work and has been one of the top-ranking pupils. In 1954, she voluntarily made a public confession of Christ and joined the church of her grandparents of her own free will.

"Said minor is provided with a swing, toys, dolls and doll house and a playhouse. She has many young friends with whom she plays and visits. She has made and enjoys friends in the Town of Gaston not only among those of her age, but with adults also. Her health is good and she has had the doctor only twice since 1951, and that was for a minor upset stomach which lasted only a day. She has grown several inches in height and has gained in weight.

"She has advantages equal to those of any child in Gaston, good schools, supervised playground, recreational facilities, a good home and church training, and above all a sense of being loved and wanted.

"12. That in 1954, when the said New York decree was entered, there was residing in the home of George A. Brewer, Sr., himself, his wife and the son of Mrs. Brewer; that the son of Mrs. Brewer is no longer residing in said home, and it is now occupied only by Mr. and Mrs. George A. Brewer, Sr. and the said Jane Elizabeth Brewer. That the

removal of the son of Mrs. George A. Brewer, Sr. provides more space in the home for the convenience and comfort of said child, and lessens the responsibility of the said Mr. and Mrs. George A. Brewer, Sr. in providing maintenance and supervision for said minor.

"13. That the petitioner, Aida Kovacs, is not a fit and proper person to have the care, custody and control of the minor, Jane Elizabeth Brewer.

"14. That George A. Brewer, Sr. is a man of excellent character, good habits and conduct, and is a fit and suitable person to have the care, custody and control of the minor, Jane Elizabeth Brewer.

"15. That the welfare, interest and development of the child will be materially promoted by allowing her to remain in the custody of George A. Brewer, Sr. and in the environment to which she has become accustomed and upon which in a measure she depends."

The decree entered pursuant to the above findings, in pertinent part, is as follows:

"1. That this Court, in passing upon the the care, custody and control of Jane Elizabeth Brewer, is not bound by or required to give effect to the decree of the Court of the State of New York made in 1954 and hereinbefore referred to.

"2. That the petitioner's petition to be awarded the care, custody and control of the said Jane Elizabeth Brewer is hereby denied.

"3. That the care, custody and control of the said Jane Elizabeth Brewer is hereby awarded to the respondent, George A. Brewer, Sr."

The petitioner appeals, assigning error.

SYLVESTER & HALMOFF, of the New York Bar, SANFORD, PHILLIPS, MCCOY & WEAVER, for petitioner;

GAY & MIDYETTE, ERIC NORFLEET, for respondent.

DENNY, *J.* The appellant's first assignment of error is based on a single exception to the court's findings of fact numbered one through fifteen and does not point out wherein the findings of fact are not supported by the evidence. Therefore, the exception is broadside, and this assignment of error presents nothing for review except whether or not the court's conclusions of law are supported by its findings. Winborne v. Stokes, 238 N. C. 414, 78 S. E. 2d 171; Burnsville v. Boone, 231 N. C. 577, 58 S. E. 2d 351.

The second assignment of error is based on an exception to his Honor's conclusion of law to the effect "that this court, in passing upon the care, custody and control of Jane Elizabeth Brewer, is not bound by nor required to give effect to the decree of the Court of the State of New York made in 1954, * * *."

Irrespective of the failure of the appellant to challenge by proper exceptions the sufficiency of the evidence to support the court's findings in the hearing below, we are of the opinion that the findings are supported by competent evidence and that they support the court's conclusion of law challenged by the second assignment of error, and we so hold. Hoskins v. Currin, 242 N. C. 432, 88 S. E. 2d 228.

The respondent, George A. Brewer, Sr., having been found to be a citizen and resident of North Carolina, domiciled in said State, to whom the custody of Jane Elizabeth Brewer, then 5½ years of age, was awarded by the New York Court on 17 January 1951; and the said minor child having been a resident in the home of her grandfather, George A. Brewer, Sr., since September 1951; and her father, George A. Brewer, Jr., having been domiciled in North Carolina since immediately after January 1951, we

hold, in the light of these findings, that the courts of North Carolina have the power and authority to hear and determine the question of the custody and welfare of the minor child involved herein. Richter v. Harmon, 243 N. C. 373, 90 S. E. 2d 744; Hoskins v. Currin, supra; Gafford v. Phelps, 235 N. N. 218, 69 S. E. 2d 313; In re Biggers, 228 N. C. 743, 47 S. E. 2d 32; In re Ogden, 211 N. C. 100, 189 S. E. 119; In re Alderman, 157 N. C. 507, 73 S. E. 126, 39 L. R. A. (N. S.) 988.

We further hold that the modification of the 1951 decree made by the New York Court in 1954, has no extra-territorial effect, and we are not bound by the full faith and credit clause of the Constitution of the United States, Article IV, section 1, to recognize and enforce the modified decree. In re Alderman, supra; In re Biggers, supra; Hoskins v. Currin, supra.

An action which relates to the custody of a child is in the nature of an *in rem* proceeding. Therefore, the child is the *res* over which the court must have jurisdiction before it may enter a valid and enforceable order. Weddington v. Weddington, 243 N. C. 702, 92 S. E. 2d 71; Richter v. Harmon, supra; Hoskins v. Currin, supra; Coble v. Coble, 229 N. C. 81, 47 S. E. 2d 798.

The Court below has found that the petitioner, Aida Kovacs, is not a fit and proper person to have the care, custody and control of the minor, Jane Elizabeth Brewer; on the other hand, it has found that George A. Brewer, Sr. is a man of excellent character, good habits and conduct and is a fit and suitable person to have the care and custoy of said minor child. The welfare of the child in controversies involving custody is the polar star by which the court must be guided in awarding custody. Smith v. Smith, 241 N. C. 307, 84 S. E. 2d 891; Griffin v. Griffin, 237 N. C. 404, 75 S. E. 2d 133; Gafford v. Phelps, supra; Walker v. Walker, 224 N. C. 751, 32 S. E. 2d 318; Story v. Story, 221 N. C. 114, 19 S. E. 2d 136.

The judgment of the court below is affirmed.